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FILED
MAY 15 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 925

3963 Bottles, more or less, etc., OWEN LABORATORIES, INC.,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on March 31, 1959.

Citations to Opinions Below

The opinion of the District Court denying petitioner's motion to dismiss the libel of information and for summary judgment is printed in Appendix A, *infra*, p. 1a, and is not officially reported. No opinion was rendered by the District Court on its order granting respondent's

motion for a default decree of condemnation for failure of the petitioner corporation to serve answers to respondent's written interrogatories. The decree of condemnation is printed in Appendix A, *infra*, p. 3a.

The Court of Appeals affirmed in an opinion printed in Appendix A, *infra*, p. 5a, which is not yet officially reported.

Jurisdiction

The decree of the Court of Appeals was made on March 31st, 1959 (Appendix A, *infra*, p. 14a), and the mandate of the Court stayed pending the filing and determination of the instant writ of certiorari, pursuant to Rule 28 of the Rules of the Court of Appeals. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether a new principle of *res administrata* should be adopted to create the same bar in administrative proceedings that *res judicata* creates in judicial proceedings.

2. Whether an exception to the rule of law that a corporation cannot invoke the privilege against self-incrimination should be promulgated under the special provisions of the Federal Food, Drug and Cosmetic Act and the decision of *U. S.* v. *Dotterweich*, 320 U. S. 277, 64 S. Ct. 1087 (1943) wherein criminal liability is imposed not only upon the corporation, but in addition, automatically upon a broad class of persons who have a responsible share in the furtherance of the transaction complained of, regardless of intent, participation or knowledge.

Statutes Involved

The statutory provisions involved are Sections 301 (a), 301 (d), 303 (a), 304 (a), 502 (a) and 505 (a) of the Federal Food, Drug and Cosmetic Act [21 U. S. C. 331 (a), 331 (d), 333 (a), 334 (a), 352 (a) and 355 (a)]. Also involved are Rules 33 and 37 (d) of the Federal Rules of Civil Procedure and the Fifth Amendment to the Constitution of the United States. They are printed in Appendix B, *infra*, p. 15a.

Statement

The instant action was commenced on December 19, 1957, by the seizure of quantities of petitioner's product upon the ground that it was misbranded under 21 U. S. C. 352 (a) because of alleged false and misleading claims in petitioner's advertising material, and upon the further ground that the product was a "new drug", within the meaning of 21 U. S. C. 355 (a), premised solely upon the same alleged claims in the same advertising material.

Prior to the commencement of the instant seizure action, and on or about September 1957, the United States Post Office Department instituted an action with respect to the same product involved in this seizure action, alleging that certain false representations were being made for the product in petitioner's advertising material.

The action with the Post Office Department was settled by means of an Affidavit of Agreement on September 26, 1957 (A 134, 135). The agreement provided for regulation of the petitioner's advertising material wherein certain prohibitory and permissive areas of advertising claims were set forth.

The Post Office Department subsequently commenced a proceeding in which it alleged that petitioner's new

advertising material was violative of the agreement and sought the issuance of a fraud order pursuant to the terms of the said agreement. A formal hearing was held and a decision rendered, that petitioner's advertising material was in conformity with and not in breach of petitioner's agreement with the Post Office Department. (U. S. Post Office Department H. E. Docket No. 5/143, in re *Owen Laboratories*).

The instant action constitutes an attack upon the legality of the same product and advertising material involved in the prior proceedings. The instant action constitutes an attack upon the regulatory agreement of the Post Office Department.

A decision in favor of respondent in this case of necessity, would be a ruling that the Post Office Department agreement is illegal and that the Post Office Department decision is invalid.

Petitioner urged that the executive branch of Government was barred from collaterally attacking its own agreement by means of a second proceeding. In effect, petitioner requested a bar in administrative proceedings comparable to the bar of *res judicata* in judicial proceedings.

On September 23, 1958, the District Court filed a memorandum opinion denying petitioner's motion, holding in effect that there could be no *res judicata* because *res judicata* requires an adjudication. This statement of law is correct, as adjudication does not occur in administrative proceedings.

On September 29, 1958, petitioner filed an answer to respondent's written interrogatories theretofore filed, declining to answer same on the grounds that under the Federal Food, Drug and Cosmetic Act, the same alleged wrong carried with it civil as well as criminal penalties, not only as against the petitioner corporation, but upon

all corporate officers, representatives and agents who have a responsible share in the furtherance of the transaction which the statute outlaws, and consequently, the matters inquired into were privileged under the Fifth Amendment to the Constitution of the United States.

On October 8, 1958, respondent moved for a default decree of condemnation under Rule 37 (d) of the Federal Rules of Civil Procedure for failure of petitioner to serve interrogatories. On October 22, 1958, the District Court granted said motion and entered a decree condemning the seized articles and a stay of the decree pending appeal to the Court of Appeals for the Seventh Circuit.

On appeal, the Court of Appeals affirmed, holding that *res judicata* principles were not present. Petitioner agrees that *res judicata* is not applicable by reason of the fact that administrative (quasi-judicial) proceedings do not act by issue adjudication in the same manner as our classical judicial proceedings.

On the issue of whether a corporation could assert a privilege and decline to answer interrogatories under the special circumstances of the Federal Food, Drug and Cosmetic Act, the Court held that the corporation must select an agent to provide the interrogatories, who would not be incriminated, but did not answer the question posed by the decision of *U. S.* v. *Dotterweich*, in the premises.

Reasons for Granting the Writ

A. Res Administrata

The rapid growth of administrative agencies during the past twenty-five years has given rise to the dominance of administrative law in our economic and social life.

This growth and power of administrative law has created the concomitant need for legal principles in regulation